

NO. 44075-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

COREAN BARNES
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Kenneth Williams, Judge

CORRECTED CROSS RESPONDENT'S REPLY BRIEF

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

TABLE OF CONTENTS

	Page
A. <u>RESPONSE TO ASSIGNMENTS OF ERROR ON CROSS APPEAL</u>	
Issues Presented on Appeal.....	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR MIS-APPLY THE LAW IN SENTENCING MR. BARENS FOR BURGLARY AND RAPE AS THE SAME CRIMINAL CONDUCT.....	3
D. <u>CONCLUSION</u>	5

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>State v. Gracian</i> , — Wn.2d —, 295 P.3d 219, 223 (2013).....	4
<i>State v. Lessley</i> , 118 Wn. 2d 773, 827 P. 2d 996 (1992).....	3-5
<i>State v. Roose</i> , 90 Wn.App. 513, 517, 957 P.2d 232.....	5

STATUTES, RULES AND OTHERS

RCW 9A.52.050.....	4
RCW 9.94A.400.....	4
RCW 9.94A.589(1).....	3, 4

A. RESPONSE TO ASSIGNMENTS OF ERROR ON CROSS APPEAL.

1. The trial court did not make an error of law in applying the same criminal conduct to merge the rape and burglary for sentencing purposes.
2. The trial court did not abuse its discretion in applying the same criminal conduct to merge the rape and burglary for sentencing purposes.

Issues Presented on Appeal

1. Did the trial court make an error of law in applying the same criminal conduct to merge the rape and burglary for sentencing purposes?
2. Did the trial court abuse its discretion in applying the same criminal conduct to merge the rape and burglary for sentencing purposes?

B. STATEMENT OF THE CASE

After the errands were complete, Ms. Russell drove Mr. Barnes to Mr. Johnson's home where she voluntarily entered Mr. Johnson's home and voluntarily kissed Mr. Barnes, but claimed that Barnes penetrated her against her will for 1-2 minutes until she made Mr. Barnes stop before ejaculating

(although she later recorded herself saying that he hadn't done anything wrong yet.¹) RP 224-229, 258. Ms. Russell had her pepper spray with her while in the house. RP 258. According to Ms. Russell, she did not use her pepper spray because she did not think it was necessary. RP 261. Ms. Russell is heard saying "no," "I don't want to," "stop," . Ex 3. After Mr. Barnes and Ms. Russell had intercourse, she drove him to his to rock plaza. RP 262.

Mr. Barnes rented a room from Mr. Johnson until the middle to end of August. RP 306. On the day in question, August 15, 2008, Mr. Barnes kept clothing at Mr. Johnson's and frequently did his laundry on the premises and was allowed to be at Mr. Johnson's home when Mr. Johnson was home. RP 307. Mr. Barnes was permitted to enter the home through an unlocked door. RP 314. On the day of the incident, Mr. Barnes was doing his laundry and gathering some of his belongings when Mr. Johnson arrived at his home shortly after Mr. Barnes' arrival. RP 315-317. Even though Mr. Johnson testified that Mr. Barnes was not allowed to be in his home without prior permission, he also testified that Mr. Barnes lived in the home until the middle to end of August. RP 306, 315-316. Mr. Barnes believed, as per his

¹ She explained at trial that she was in denial and that she didn't think it was a crime for Mr. Barnes to touch her in this way. RP 235

custom with Mr. Johnson that he could do his laundry and collect his belongings as needed. RP 389, 393-394.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR MIS-APPLY THE LAW IN SENTENCING MR. BARENS FOR BURGLARY AND RAPE AS THE SAME CRIMINAL CONDUCT.

In its cross-appeal, the State contends that the trial court erred as a matter of law by concluding that because the burglary and the rape offenses were the same criminal conduct, it was required to count those offenses as one crime in determining the applicable standard range under RCW 9.94A.589(1)(a). The State also argues that under *State v. Lessley*, 118 Wn. 2d 773, 781-82, 827 P. 2d 996 (1992), and RCW 9.94A.589, the trial court did not have the discretion to count the rape and burglary sentences separately because the victims were not the same.

A determination of “same criminal conduct” at sentencing affects the standard range sentence by altering the offender score. RCW 9.94A.589(1). “[I]f the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.” RCW 9.94A.589(1).

Crimes constitute the “same criminal conduct” when they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1). The defendant “must establish [that] the crimes constitute the same criminal conduct.” *State v. Gracian*, — Wn.2d —, 295 P.3d 219, 223 (2013).

In *Lessley*, the Supreme Court held that when one of a defendant's current offenses is burglary, the burglary antimerger statute allows the “sentencing judge discretion to punish for burglary, even where it and an additional crime encompass the same criminal conduct.” *Lessley*, 118 Wn. 2d at 781. *Lessley* reiterated that there was a conflict between the plain language of the burglary antimerger statute (former RCW 9.94A.400), which provided for separate punishment for burglaries, and the provision now contained in RCW 9.94A.589(1)(a), which does not provide for additional punishment for the “same criminal conduct.” *Lessley*, 118 Wn. 2d at 781.

RCW 9A.52.050, the burglary antimerger statute, provides:

Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.

Lessley, 118 Wn. 2d at 780.

The Court in *Lessley* applied rules of construction to harmonize the statutes rather than find that the antimerger statute had been implicitly repealed. The Court held that application of the burglary antimerger statute is discretionary with the sentencing judge and permits the court to decide whether to impose separate punishment for burglary and other crimes simultaneously committed. *Lessley*, 118 Wn. 2d at 781; *see also State v. Roose*, 90 Wn.App. 513, 517, 957 P.2d 232 (1998) (analyzing *Lessley*).

The Court in *Lessley* held under the facts of that case, where there was a burglary of a home occupied by two people and a kidnapping of only one person, there were multiple victims thus precluding application of the “same criminal conduct”. *Lessley*, 118 Wn. 2d at 780-82.

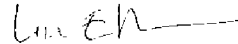
Here, it was debatable whether Mr. Barnes had permission to enter the Johnson home, thus there is not a strong case for multiple victims. In the absence of multiple victims, the trial court properly exercised its discretion and did not err in sentencing Mr. Barnes for both crimes as “same criminal conduct”. For these reasons, the trial court did not err or abuse its discretion. If this Court does not reverse the trial court the current sentence should stand.

D. CONCLUSION

Mr. Barnes respectfully requests this affirm the trial court’s sentencing ruling on same criminal conduct.

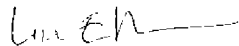
DATED this 13th day of July 2013

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Clallam County Prosecutor's _ **Lewis Schrawyer** lschrawyer@co.clallam.wa.us and Corean Barnes DOC# 317817 Washington Corrections Center Airway Heights CC PO Box 2049 Airway Heights, WA 99001 a true copy of the document to which this certificate is affixed on August 1, 2013. Service was made by electronically to the prosecutor and to Mr. Carter by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

ELLNER LAW OFFICE

August 01, 2013 - 1:32 PM

Transmittal Letter

Document Uploaded: 440750-Appellant Cross-Respondent's Brief.pdf

Case Name: State v. Corean Barnes

Court of Appeals Case Number: 44075-0

Is this a Personal Restraint Petition? Yes ☐ No ☒

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Appellant Cross-Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lise Ellner - Email: **liseellnerlaw@comcast.net**

A copy of this document has been emailed to the following addresses:
lschrawyer@co.clallam.wa.us